July 9, 1984 wherein he stated, *inter alia*, that the defendants had without his knowledge and consent and without his authority taken away some 1,800 tons of cut timber that had been felled and logged by him and estimated by him to be worth some $500,000.00. He also complained that the defendants had allowed other persons to enter into and fell trees in the concession area that the defendants had contracted out to the plaintiff. He had said that these acts of the defendants were in breach of the terms of the contract and was causing him irrevocable damage.

When the defendants had not entered an appearance to the writ within the prescribed eight days the plaintiff came back to the Court and on July 20, 1984 an order was made giving the plaintiff liberty to "move and/or deal with" the said cut timber which apparently had been located at Gua Musang Railway Station. The plaintiff took possession of and sold the timber.

On July 23, 1984 the defendants filed their application which is the matter now before me whereby they ask for the interim injunction to be set aside and they ask for damages. The grounds they rely on are not set out in the summons as is required by the Rules – see Order 32 rule 1 and Form 62. It is further noted that the defendants have not made any indorsement in the summons to the effect that they would be relying on any supporting affidavit.

En passant I pause to observe that there appears to me to be a lamentable prevalence for solicitors to ignore the requirements of the procedural rules and to lean heavily on the Court's inherent powers reiterated in Order 92 rule 4 of the Rules of High Court.

The affidavits that were read in support of the defendants' application were that of one Datuk Ong Kian Seng, the Managing Director of the defendant company affirmed and filed on September 17, 1984 and of one Ong Teng Buey affirmed on September 17, and filed on the 18th.

That the defendants had entered into the written agreement of October 16, 1982 with the plaintiff and that that agreement continues to subsist is admitted by Datuk Ong. That the defendants had removed the cut timber (but said to be some 1,300 tons and not 1,800 tons) is also admitted.

Since the plaintiff had already taken possession of the timber at Gua Musang and had sold it, setting aside that part of the order restraining the defendants from moving or dealing with that timber serves no purpose. In any event under the terms of the contract it was for the plaintiff "to fell log and remove timber from the Contract Area". Under the terms of the contract the defendants had no business removing the cut timber as they did and having done so without informing the plaintiff that they were going to do so, the plaintiff was perfectly justified in moving the Court *ex parte* for the interim injunction.

As to the other part of the order which is the first limb of the interim injunction, it does nothing more than restrain the defendants from committing breaches of the terms of the contract and so long as the contract subsists I can see no reason for the defendants to complain that they are restrained from committing breaches of it.

In the circumstances I see no call for me at this stage to go any deeper into the matter.

The application is dismissed with costs.

Application dismissed.

Solicitors : *K.Y. Foo & Co.; Mahinder Singh Dulku.*

PERCETAKAN SOLAI SDN. BHD. v. KIN KWOK DAILY NEWS SDN. BHD. & ANOR.

[O.C.J. (George J.) November 21, 22 & December 19, 1984]

[Kuala Lumpur – Suit No. C 1888 of 1982]

Contract – Compromise of claim – Two options given to one party – One option allowed to pass – Second option to be exercised within reasonable time.

In this case the plaintiff company had been selling printing material and newsprint to the first defendant company. There was some dispute as to the actual amount due to the plaintiff. Finally parties entered into a compromise agreement and the defendants agreed that the total value of goods received by them amounted to $1,475,000. The plaintiff agreed to permit the defendants to pay 45% of the said amount in 24 monthly equal instalments commencing from February 25, 1981 or within one month after the audit of the accounts of the defendant company and approved by the Board of Directors. In case of default in the payment of one or any instalment for a period of 30 days after the same had become due, the whole of the

original debt of $1,475,000 would become payable immediately. The second defendant company guaranteed the performance of the above agreement by the first defendant company. The first defendant company failed to make payment of any instalments. They contended that the agreement provided two options that is payment of instalments from February 25, 1985 or within one month after the audit of the accounts and approval thereof by the Board of Directors of the defendant company and as the accounts had not been audited there was no call to commence the payments of the instalments.

Held: (1) there was an implied term in that agreement that the audit of the first defendants, accounts and approval thereof by the Board of Directors should be effected within a reasonable period say within three months. Anything more than that would be unreasonable;

(2) there was no excuse for the first defendants to have not commenced the payment one month after August 11, 1982 by which date the actual audit had been made;

(3) the plaintiffs were entitled to claim the whole amount of $1,475,000 with interest and costs.

Cases referred to:

(1) *McIlquham* v. *Taylor* [1895] 1 Ch. 53.
(2) *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* [1963] 1 All E.R. 545, 561.
(3) *Sinason-Teicher Corpn.* v. *Oilcakes etc. Co.* [1954] 2 All E.R. 497.
(4) *Hartwells of Oxford Ltd.* v. *British Motor Trade Assoc.* [1950] 2 All E.R. 705.
(5) *Saw* v. *Hakim* 5 T.L.R. 72.
(6) *Sheppards* v. *Wilkinson* 6 T.L.R. 13
(7) *Jones* v. *Stone* [1894] A.C. 122.
(8) *Electric and General Corporation* v. *Thomson-Houston Electric,* 10 T.L.R. 103.
(9) *Cow* v. *Casey* [1949] 1 K.B. 474, 481.

CIVIL SUIT.

Gurbakhash Singh for the plaintiffs/appellants.
Liza Chan for the defendants/respondents.

Cur. Adv. Vult.

George J. : This is an appeal against the refusal by the Senior Assistant Registrar to allow the plaintiffs to enter final judgment against the defendants on an Order 14 application as prayed or at all.

The affidavits filed in support of the application and opposing it reveal that the plaintiff company are suppliers of printing material and that they had been from time to time selling such printing material including newsprint to the 1st defendant company. It would appear that at one stage in the relations between the two companies, one Sham Kong Shing *alias* Sum Kok Seng was a director in each of the two companies and it would seem that through his influence not only were goods sold by the plaintiffs to the 1st defendants on virtually unlimited credit terms but from time to time substantial sums of moneys were lent by the plaintiffs to the 1st defendants. As to the goods sold to the 1st defendants by the plaintiffs, delivery was made to the 1st defendants either by the plaintiffs or by the plaintiffs' foreign suppliers on the instructions of the plaintiffs.

By a letter dated June 26, 1980 the plaintiffs sought the confirmation of the 1st defendants that the balance outstanding due from the 1st defendants to the plaintiffs was $1,666,869.54. By that letter the plaintiffs informed the 1st defendants that the confirmation sought was needed in respect of the audit of the plaintiffs' accounts and required the 1st defendants to supply details of discrepancies if the confirmation sought was not forthcoming. The confirmation was provided by the 1st defendants on June 26, 1980.

The plaintiffs contend that as on the date of the amended statement of claim the balance outstanding was $1,496,869.71 and by the Order 14 application they asked (as the first of their two alternate claims) for judgment in that amount, interest from date of filing the writ and costs as against the 1st defendants.

Now, prior to the Order 14 application coming on for hearing before the Senior Assistant Registrar the plaintiffs had managed to get answers to certain interrogatories by which the defendants admitted to having bought goods from the plaintiffs at the cost of $1,920,526.72. The defendants also admitted by the Answers to the interrogatories to having borrowed from the plaintiffs $1,737,446.00. The total of these two amounts is $3,657,972.72. The defendants also stated in the Answers that up to 1982 they had paid to the plaintiffs $2,933,036.94. That amount deducted from the $3,657,972.72 gives a balance of $724,935.78.

Miss Liza Chan of counsel for the defendants pointed out that in settling the Answers there was an inadvertent duplication of one of the invoices No: 1086, and that because of that an amount of $184,246.62 should be debited to the $3,657,972.72. Mr. Gurbakhash Singh conceded that there was such a duplication. The difference between that reduced amount and the amount paid is $540,689.16. It was contended for the plaintiffs that even taking into account the said duplication there was an unqualified admission by

the 1st defendants that they owed the plaintiffs $540,689.16.

But for the fact of the parties having entered into the agreement that they had entered into on November 28, 1980 (which agreement is more particularly examined further down in this judgment), at this stage in the action the plaintiffs would have been entitled on this aspect of their claim to summary judgment in the sum of $540,689.16 (as being an admitted amount) together with interest thereon at 8% per annum from the date of the writ and the defendants would have been entitled to unconditional leave to defend in respect of the rest of the plaintiffs' claim.

What had happened was that in spite of that unqualified admission by the 1st defendants, on June 26, 1980, of the amount owing, it would seem that in November 1980 the plaintiff company was prepared to allow the 1st defendants to have their accounts audited before ascertaining what was acceptable by the 1st defendants as owing to the plaintiffs. Tee An Chuan, the Managing Director of the 1st defendant company, in his affidavit affirmed on April 4, 1983 stated at paragraph 11:

"However sometime in November, 1980 after discussions the defendant company was prepared to compromise this matter and entered into an agreement with the plaintiff company on or about November 28, 1980, a copy of which agreement is now shown and produced to me and marked 'TAC-1' herein."

With the parties entering into that written agreement whatever rights the plaintiffs had against the 1st defendants prior thereto were superseded by the terms and conditions of the agreement. The plaintiffs indeed seem to appreciate that that could be the position as their alternative claim is on the said agreement. They say that on that agreement they are entitled to judgment against the defendants in the sum of $1,475,000.00.

Portions of the agreement starting with the two preambles need to be read:

"*WHEREAS* the said Creditor has sold and delivered goods to the said Company in the sum of Ringgit ONE MILLION FOUR HUNDRED AND SEVENTY FIVE THOUSAND ($1,475,000). The aforesaid sum shall be subjected to the audit of accounts of the said Company and approved by the Board of Directors of the said Company (hereinafter called 'the said debt').

AND WHEREAS at the request of the said Company and the said Guarantor, the said Creditor has agreed to withhold legal proceedings against the said Company and to permit the said Company to pay the reduced sum of 45% of the said debt (hereinafter called 'the Reduced Sum') in the manner hereinafter provided and the said Guarantor have agreed to guarantee the due repayment of the 45% of the said Debt by the said Company on the terms hereinafter contained.

NOW IT IS HEREBY AGREED as follows:

(1) In consideration of the said Creditor having at the request of the said Company and the said Guarantor to withhold legal proceedings against the said Company and to permit the said Company to pay the 45% of the said debt in the manner hereinafter set out, the said Guarantor guarantees the due repayment of the said sum of 45% of the said debt by the said Company.

(2) The said Company shall repay the said sum of 45% of the said debt in the following manner:

(a) the said sum of 45% of the debt by twenty four (24) monthly equal instalments commencing from February 25, 1981 or within one month after the audit of the accounts of the said Company and approved by the Board of Directors of the said Company;

(b) a sum of 25% of the said reduced sum by adjustment of accounts of the said Creditor with the said Company in respect of advertisements to be placed in KIN KWOK DAILY NEWS over the next two (2) years commencing on January 1, 1981.

(3) If the said Company shall have defaulted in the payment of one or any instalments for a period of thirty (30) days after the same shall have become due, then the whole of the original debt less such sums as shall have paid or received hereunder.

(4) The said Guarantor covenants with the said Creditor that if the said Company shall in any respect fail to carry out the provision in Clauses 2 and 3 above, they shall make good any default by the said Company within seven (7) days upon being notified thereof in the payment of the sums due thereunder.

(5) This guarantee granted herein shall be a continuing guarantee and shall only be discharged upon the full settlement of the sums due hereunder.

IN WITNESS WHEREOF . . ."

The 1st defendant company failed to make payment of any instalments. They contend that clause 2(a) provided two options in respect of the commencement of the payment of the instalments *i.e.* either from February 25, 1981 or within one month after the audit of the accounts of the 1st defendants and approval thereof by the Board of Directors and that they were entitled to and relied on the second option and that as the accounts had not been audited there was no call to commence the payments of the instalments. Their Managing Director Tee An Chuan in paragraph 15 of his affidavit of April 4, 1983, explained that, "As the latter condition had not been carried out any sum

due to the plaintiff Company (if at all) is not due and payable until after the said audit and approval by the Board of Directors." According to paragraph 8 of the statement of defence the 1st defendants had by letter of July 30, 1982 "indicated" that the alternative modus of payment (*i.e.* commencement of the payment of instalments within 30 days of the audit of accounts and approval thereof by the Board of Directors) "was not viable as their accounts would take some time to audit and this would protract and delay repayment of the said sum to the plaintiffs."

Mr. Gurbakhash Singh of counsel for the plaintiffs submitted that if a promise is made in the alternative form and one alternative is impossible to perform, the promisor must as a general rule perform the other. Paragraph 446 of *Halsbury's* 4th Edition Volume 9 (on contracts) reads:

> "446. Alternative promises. When a promise is made in an alternative form and one alternative is impossible to perform, the question whether the promisor is bound to perform the other or is altogether excused depends on the intention of the parties to be ascertained from the nature and terms of the contract and the circumstances of the particular case. The usual result in such a case will be that the promisor must perform the alternative which remains possible; but it may be that on the proper construction of the contract there is not one obligation to be performed in alternative ways but one obligation to be performed in one way unless the promisor chooses to substitute another way, in which case, the primary obligation being impeded, the promisor is not bound to exercise the option for the benefit of the other party."

In *McIlquham* v. *Taylor*[1] the defendant had covenanted by deed within 12 months to pay the sum of £1,000 or transfer to the plaintiff £1,000 worth of fully paid shares in a company to be formed by the defendant. The defendant formed the company but in such a way that he was not able to transfer £1,000 worth of fully paid shares in it to the plaintiff. Stirling J. in the Chancery Division held that the defendant not being in a position to comply with that part of the covenant to transfer the shares was bound to perform the alternative and pay the £1,000 which judgment was affirmed by the Court of Appeal.

In the instant case however that principle had really no application because when February 25, 1981 had passed by and the 1st defendant had not commenced payment of the first instalment it amounted to the exercise of the option by the 1st defendants to commence payment of the instalments from the alternative period provided by clause 2(a) of the agreement. In effect the 1st defendants were left with no option but to commence payments one month after the audit of their accounts and approval thereof by their Board of Directors. Since February 25, 1981 had come and gone the 1st defendants could not fall back on commencement of payment of instalments from that date. See *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food*[2] at 561F.

Now, "Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case." (*Halsbury's* 4th Edition Volume 9 paragraph 479). There was an implied term in that agreement of November 28, 1980 that the audit of the 1st defendants' accounts and the approval thereof by the Board of Directors would and should be effected within a reasonable period and if not, in my judgment, the 1st defendants had to commence payment of the instalments within one month of the expiry of that reasonable period. Reasonable time has to be computed in all the relevant circumstances that obtain. (See for instance *Sinason-Teicher Corpn.* v. *Oilcakes, etc. Co.*[3] in respect of the provision of a bank guarantee and *Hartwells of Oxford Ltd.* v. *British Motor Trade Assoc.*[4] in respect of delivery of a motor car.)

In the instant case the agreement of November 28, 1980 provided that the first of the 24 monthly instalments was to be paid either on February 25, 1981 "or within one month after the audit . . ."

That one of the two modes of instalment payment called for the commencement of such payments from February 25, 1981 compellingly suggests that the commencement of the alternative instalment payment programme should be at about the same time or soon after. In the context it seems to me that for it to be reasonable, at most there could have been an allowable delay of two or three months from February 25, 1981 for completing the audit and for obtaining the approval thereof by the Board before the commencement of the payment of the instalments. Anything more than that would be unreasonable.

It is also seen (from clause 2(a) and b) that the scheme of the agreement was that within two years or thereabouts, 45% of $1,475,000.00 would be paid to the plaintiffs, 75% thereof in cash and 25% thereof by advertisements in the 1st defendants' newspaper. In October 1982, when some 19 months

(from February 25, 1981) had passed without any commencement of payment of instalments, it seems to me that in any event the plaintiffs were entitled to take the attitude that more than sufficient time had passed. They caused the writ to issue on October 2, 1982 and say that they are entitled to summary judgment under Order 14 for the full amount of $1,475,000.00, interest and costs pursuant to clause 3 of the agreement.

My attention has also been drawn to the fact that in any event there is an admission that the accounts of the 1st defendants had in fact been audited. What had happened was that the 1st defendant company had by their letter of August 6, 1982 requested the plaintiffs to confirm that the balance due to the plaintiffs was $1,415,314.60. The plaintiffs provided the confirmation in writing. A few days later on August 11, 1982 the defendant company wrote again to the plaintiffs stating that that amount was not final. Tee An Chuan the Managing Director of the 1st defendant company explained what had happened and why, in paragraph 21, 22 and 23 of his affidavit of August 2, 1983 (enclosure 18) *viz*:

"21. With respect to paragraph 15 of the Second Affidavit the exhibit therein namely exhibit P466 was issued by the Defendant Company's internal audit department and was part of the general procedure whereby these were sent to all Creditors/debtors extracted from the entries in books of the Defendant Company but without verification or substantiation at that time of the original documents supporting such entries. This was done as amongst the preliminary steps in attempting to finalise the audit mentioned pursuant to paragraph 22 herein.

22. However, on the actual audit involving the original documents in support of the book entries there were material and irreconcilable discrepancies some of which have been highlighted in by paragraphs 12, 13, 14, 15 and 15 above.

23. Upon ascertaining this the Defendant Company promptly by letter dated August 11, 1982 to the Plaintiff Company informed it that the sum was not final and requested for the Plaintiff Company's statement of account."

I agree with Mr. Gurbakhash Singh that this amounts to an admission that by August 11, 1982 there had been an "actual audit".

Now, on a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence he ought to be given leave to defend (*Saw* v. *Hakim*[5]). A defendant should not be shut out from defending unless it is very clear indeed that he has no case in the action under discussion (*Sheppards* v. *Wilkinson*[6]). The power to give summary judgment under Order 14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay" (*Jones* v. *Stone*[7]). Where there is any serious conflict as to matters of fact or where any real difficulty as to matters of law arises, summary judgment under Order 14 should not be granted. (*Electric and General Corpn.* v. *Thomson-Houston Electric*[18]). But, however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable it will give final judgment (*Cow* v. *Casey*[9]).

In the instant case the claim based on the agreement of November 28, 1980 turns on the true construction of the provisions of the agreement which boils down to the question whether the defendants can be allowed to rely on their contention that their accounts had not been audited. All the necessary evidence necessary to adjudge the issue was before the Court and the law to be applied is really trite. That within a reasonable period of February 25, 1981 the defendants should have commenced payment of the instalments is unarguable. In my judgment the accounts should have been audited and approved within a reasonable period after February 25, 1981 which I hold to be not later than three months from that date which would take the matter to May 24, 1981 and the first of the instalments should have been paid one month thereafter *i.e.* not later than June 24, 1981. Even if I am wrong on this there was no excuse whatsoever for the 1st defendants to have not commenced the payments one month after August 11, 1982 by which date I have found as a fact that the "actual" audit had been made.

The plaintiffs were entitled to invoke clause 3 of the agreement as they have done by their alternative claim and are entitled to final judgment in the sum of $1,475,000.00 together with interest thereon at 8% per annum as prayed.

The appeal is allowed with costs. There will be final judgment for the plaintiffs as against the 1st defendants in the sum of $1,475,000.00 together with interest thereon at 8% per annum from the date of the writ.

Appeal allowed.

Solicitors: *Gurbakhash & Tan; Megat Najmuddin, Leong & Co.*